

## RECENT DEVELOPMENTS

### *Wright v. Universal Maritime Service Corp.\**

#### I. INTRODUCTION

Probably one of the most controversial topics in the fields of labor law and alternative dispute resolution is whether it should be permissible for a union to waive an employee's right to have statutory rights enforced in a judicial forum, particularly those rights protected under antidiscrimination statutes, in the context of a collectively-bargained agreement that requires arbitration for resolution of employer-employee disputes. The Supreme Court fueled the controversy when it decided *Gilmer v. Interstate/Johnson Lane Corp.*<sup>1</sup> in 1991—a case that held in favor of such waivers in the context of individual employment agreements, distinguishing its earlier “anti-waiver” case, *Alexander v. Gardner-Denver Co.*,<sup>2</sup> which involved a collective-bargaining agreement (CBA).

*Gilmer* represented the growing trend of the Court to resolve concerns regarding the scope of arbitral disputes in favor of arbitration.<sup>3</sup> Indeed, despite *Gilmer*'s explicit effort to distinguish itself from *Gardner-Denver*,<sup>4</sup> debate and some uncertainty continue as to whether *Gardner-Denver* should be given any effect at all in the context of CBAs;<sup>5</sup> and one Circuit has held that *Gilmer* did indeed abrogate *Gardner-Denver*.<sup>6</sup>

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\* 119 S. Ct. 391 (1998).

<sup>1</sup> 500 U.S. 20 (1991).

<sup>2</sup> 415 U.S. 36 (1974).

<sup>3</sup> See *Gilmer*, 500 U.S. at 26 (stating that “questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration”) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)).

<sup>4</sup> See *id.* at 35.

<sup>5</sup> See generally Sarah Rudolph Cole, *A Funny Thing Happened on the Way to the (Alternative) Forum: Reexamining Alexander v. Gardner-Denver in the Wake of Gilmer v. Interstate/Johnson Lane Corp.*, 1997 BYU L. REV. 591 (1997); William H. Daughtrey, Jr. & Donnie L. Kidd, Jr., *Modifications Necessary for Commercial Arbitration Law to Protect Statutory Rights Against Discrimination in Employment: A Discussion and Proposals for Change*, 14 OHIO ST. J. ON DISP. RESOL. 29, 51–53 (1998); George Nicolau, *Gilmer v. Interstate/Johnson Lane Corp.: Its Ramifications and Implications for Employees, Employers and Practitioners*, 1 U. PA. J. LAB. & EMP. L. 177 (1998).

<sup>6</sup> See *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875, 880–881, 882–885 (4th Cir. 1996) (holding that *Gilmer* requires enforcement of a CBA's

In its most recent decision on the matter, *Wright v. Universal Maritime Service Corp.*,<sup>7</sup> the Court had an opportunity to relieve the *Gardner-Denver/Gilmer* tension, but opted not to. By a unanimous vote,<sup>8</sup> the Court fashioned a rule stating that *if* a waiver of statutory rights in a CBA is enforceable, such a waiver must be stated in "clear and unmistakable" language.<sup>9</sup> The Court stated that it did not have to decide whether explicit waivers are enforceable because it held that no such waiver existed in the case before it.<sup>10</sup>

## II. TWO SEMINAL CASES LEADING TO *WRIGHT*: THE *GARDNER-DENVER/GILMER* TENSION

### A. *Alexander v. Gardner-Denver Co.*

In this 1974 decision, the Supreme Court held that a mandatory arbitration clause in a collective-bargaining agreement does not preclude a plaintiff from filing his Title VII<sup>11</sup> claim in court.<sup>12</sup>

Alexander, a black former employee, filed a grievance under the collective-bargaining agreement in force at the time.<sup>13</sup> In his initial grievance statement, Alexander did not allege racial discrimination;<sup>14</sup> he did not make such an allegation until the final pre-arbitration step of the

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mandatory arbitration provision in the context of civil rights). Note that, since *Gilmer*, the vast majority of circuits have upheld the right of an employee to sue under various statutes without having to resort to the arbitration clause in a CBA. *See, e.g.*, *Albertson's, Inc. v. United Food & Commercial Workers Union*, 157 F.3d 758, 762 (9th Cir. 1998) (ruling under the Fair Labor Standards Act (FLSA)); *Penny v. United Parcel Serv.*, 128 F.3d 408, 413-414 (6th Cir. 1997) (ruling under the Americans with Disabilities Act (ADA)); *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437, 1453-1454 (10th Cir. 1997) (ruling under Title VII), *vacated on other grounds*, 118 S. Ct. 2364 (1998); *Brisentine v. Stone & Webster Eng'g Corp.*, 117 F.3d 519, 526-527 (11th Cir. 1997) (ruling under the ADA); *Varnier v. National Super Mkts., Inc.*, 94 F.3d 1209, 1213 (8th Cir. 1996) (ruling under Title VII).

<sup>7</sup> 119 S. Ct. 391 (1998).

<sup>8</sup> *See id.* at 392.

<sup>9</sup> *Id.* at 396-397.

<sup>10</sup> *See id.*

<sup>11</sup> 42 U.S.C. §§ 1981-2000h-6 (1994) (prohibiting race and gender discrimination).

<sup>12</sup> *See Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 59-60 (1974).

<sup>13</sup> *See id.* at 39.

<sup>14</sup> *See id.*

grievance procedure.<sup>15</sup> The employer rejected his claims of discrimination and wrongful discharge, triggering the use of arbitration to settle the dispute.<sup>16</sup>

Before the arbitration proceeding, Alexander filed his discrimination charge with the Equal Employment Opportunity Commission (EEOC);<sup>17</sup> and prior to the EEOC's determination, the arbitrator ruled in favor of the employer.<sup>18</sup> The EEOC eventually determined that there was no reasonable cause to believe that Alexander's employer violated Title VII.<sup>19</sup> After both of these rejections, Alexander filed his Title VII action in federal district court.<sup>20</sup> The employer argued that Alexander should be bound by the arbitral decision, and the district court agreed.<sup>21</sup> The court of appeals affirmed the opinion of the district court,<sup>22</sup> but the Supreme Court reversed the appellate decision.<sup>23</sup>

Emphasizing that "the private right of action [is] an essential means of obtaining judicial enforcement of Title VII,"<sup>24</sup> the Supreme Court held that the arbitral forum is not appropriate for the final resolution of rights protected by the Act.<sup>25</sup> The Court reasoned that the arbitrator's area of competence is the interpretation of contracts, not legislation.<sup>26</sup> In addition, the Court noted that the fact-finding process in arbitration falls far short of the procedures and rights common to civil trials.<sup>27</sup> The Court further noted

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<sup>15</sup> See *id.* at 42.

<sup>16</sup> See *id.*

<sup>17</sup> See *id.*

<sup>18</sup> See *id.* at 42-43.

<sup>19</sup> See *id.* at 43.

<sup>20</sup> See *id.*

<sup>21</sup> See *id.*

<sup>22</sup> See *id.*

<sup>23</sup> See *id.*

<sup>24</sup> *Id.* at 45.

<sup>25</sup> See *id.* at 56-57; see also Daughtrey & Kidd, *supra* note 5, at 51-53 (discussing the Court's holding in *Gardner-Denver*).

<sup>26</sup> See *Gardner-Denver*, 415 U.S. at 56-57 (stating that "the specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land"); see also Daughtrey & Kidd, *supra* note 5, at 52.

<sup>27</sup> See *Gardner-Denver*, 415 U.S. at 57-58 (noting that discovery, compulsory process, and the oath are absent from, or severely limited in, arbitration proceedings); see also Daughtrey & Kidd, *supra* note 5, at 52.

its concern with the fact that the arbitrators in the case before it did not have to give written reasons for the awards they might give.<sup>28</sup>

Also significant to *Gardner-Denver* was the Court's recognition of the nonmajoritarian nature of Title VII rights, stating that the Act concerns "an *individual's* right to equal employment opportunities."<sup>29</sup> In other words, waiver of the right to a judicial forum for Title VII claims by majoritarian process (i.e., via a collective-bargaining agreement) and requiring an employee to rely on the union to represent him in arbitration "would defeat the paramount congressional purpose behind [the Act]."<sup>30</sup>

Related to its concerns surrounding the potential hindrance of rights that are individual by nature, the Court also expressed its concern over "the union's exclusive control over the manner and extent to which an individual grievance is presented,"<sup>31</sup> reasoning that, "[i]n arbitration, as in the collective-bargaining process, the interests of the individual employee may be subordinated to the collective interests of all employees in the bargaining unit."<sup>32</sup>

#### B. *Gilmer v. Interstate/Johnson Lane Corp.*

Decided in 1991, *Gilmer* involved a claim of age discrimination under the Age Discrimination in Employment Act<sup>33</sup> (ADEA).<sup>34</sup> In *Gilmer*, the Court enforced an *individual* employment agreement to arbitrate.<sup>35</sup>

Robert Gilmer, the plaintiff, was discharged from employment by Interstate at the age of sixty-two.<sup>36</sup> He was originally hired as a Manager of Financial Services, and his employment required him to register with several stock exchanges.<sup>37</sup> As part of his application form for the New York Stock Exchange (NYSE), he had agreed to submit to arbitration for

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<sup>28</sup> See *Gardner-Denver*, 415 U.S. at 57-58; see also Daughtrey & Kidd, *supra* note 5, at 52.

<sup>29</sup> *Gardner-Denver*, 415 U.S. at 51 (emphasis added).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 58 n.19.

<sup>32</sup> *Id.*

<sup>33</sup> 29 U.S.C. §§ 621-634 (1994) (prohibiting age discrimination).

<sup>34</sup> See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 23 (1991).

<sup>35</sup> See *id.*

<sup>36</sup> See *id.*

<sup>37</sup> See *id.*

certain disputes and controversies that might arise between him and Interstate.<sup>38</sup>

After filing an ADEA charge with the EEOC, Gilmer brought suit in federal district court.<sup>39</sup> The court denied Interstate's motion to compel arbitration, primarily relying on *Gardner-Denver*.<sup>40</sup> The Court of Appeals for the Fourth Circuit reversed, and the Supreme Court affirmed the court of appeals' decision.<sup>41</sup>

The Court essentially rejected the contention it enunciated in *Gardner-Denver* that the arbitral forum is inappropriate for claims arising under antidiscrimination statutes.<sup>42</sup> Indeed, the Court addressed many of the same concerns discussed in *Gardner-Denver*,<sup>43</sup> but turned the conclusions made on those issues in *Gardner-Denver* on their collective head.<sup>44</sup>

Despite its divergence with *Gardner-Denver* on key issues, the Court in *Gilmer* made an explicit attempt to distinguish *Gardner-Denver*. The Court noted that an important concern underlying *Gardner-Denver* "was the tension between collective representation and individual statutory rights."<sup>45</sup> Because Gilmer personally signed his NYSE application (which contained the arbitration clause), the Court stated that such concerns did not exist in the case before it.<sup>46</sup>

The Court also emphasized that the case before it was being decided under the Federal Arbitration Act (FAA),<sup>47</sup> which represents a "liberal

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<sup>38</sup> See *id.*

<sup>39</sup> See *id.* at 24.

<sup>40</sup> See *id.*

<sup>41</sup> See *id.*

<sup>42</sup> See *id.* at 28-33.

<sup>43</sup> Two of the concerns addressed by *Gardner-Denver* and *Gilmer* are the inadequacy of the fact-finding process in arbitration and the lack of written opinions and reasons for the arbitrator's award. See *id.*

<sup>44</sup> See *id.* Addressing the concern that the limited discovery allowed in arbitration is inadequate for ADEA claims, the Court opined that "[i]t is unlikely . . . that age discrimination claims require more extensive discovery than other claims that we have found to be arbitrable, such as RICO and antitrust claims." *Id.* at 31. As for the lack of written opinions and reasons for the arbitrator's decision, the Court noted the absence of that concern in the case before it, stating that the NYSE rules "do require that all arbitration awards be in writing, and that the awards contain the names of the parties, a summary of the issues in controversy, and a description of the award issued." *Id.* at 31-32.

<sup>45</sup> *Id.* at 35.

<sup>46</sup> See *id.*

<sup>47</sup> 9 U.S.C. §§ 1-16 (1994).

federal policy favoring arbitration agreements.”<sup>48</sup> *Gardner-Denver* and the line of cases following it,<sup>49</sup> the Court noted, “were not decided under the FAA.”<sup>50</sup>

Since the Court’s decision in *Gilmer*, courts of appeals and district courts have expanded *Gilmer* to include antidiscrimination statutes such as the FLSA, ADA, and Title VII.<sup>51</sup>

### III. WRIGHT: FACTS AND PROCEDURAL HISTORY

On February 18, 1992, Caesar Wright, the plaintiff, was injured while working as a longshoreman.<sup>52</sup> Seeking worker’s compensation for permanent disability, he settled his claim for a substantial sum and was awarded social security disability benefits.<sup>53</sup> Wright returned to the docks in January 1995 and received work with a few stevedoring companies through union referrals.<sup>54</sup> When those companies discovered he had settled a claim for permanent disability, they refused to employ him because, they claimed, his “disability” rendered him unqualified to work as a longshoreman.<sup>55</sup>

Wright approached the union and asked for help in getting back to work.<sup>56</sup> The collective-bargaining agreement in effect at the time provided for a grievance procedure for “[m]atters under dispute.”<sup>57</sup> The procedure entailed two levels of grievance committees and, then, if a majority decision could not be reached by the first- or second-level committees, the dispute was to be sent to arbitration.<sup>58</sup> Notwithstanding the grievance procedure, according to Wright, the union suggested that he obtain counsel

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<sup>48</sup> *Gilmer*, 500 U.S. at 35 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985)).

<sup>49</sup> For a discussion of, and citations to, the *Gardner-Denver* line of cases, see Daughtrey & Kidd, *supra* note 5, at 53–56.

<sup>50</sup> *Gilmer*, 500 U.S. at 35.

<sup>51</sup> For a discussion on post-*Gilmer* cases, see Daughtrey & Kidd, *supra* note 5, at 59–64.

<sup>52</sup> See *Wright v. Universal Maritime Serv. Corp.*, 119 S. Ct. 391, 393 (1998).

<sup>53</sup> See *id.*

<sup>54</sup> See *id.*

<sup>55</sup> See *id.*

<sup>56</sup> See *id.* at 394.

<sup>57</sup> *Id.* at 393.

<sup>58</sup> See *id.*

and file an ADA claim.<sup>59</sup> Wright did indeed file charges with the EEOC, and was issued a right-to-sue letter by the agency.<sup>60</sup> In January 1996, he filed a complaint in federal district court against the South Carolina Stevedoring Association and six of its member-companies.<sup>61</sup>

The case was referred to a magistrate judge.<sup>62</sup> The district court was charged with deciding whether the magistrate judge was correct to recommend the dismissal of Wright's action for lack of jurisdiction.<sup>63</sup> Basing his decision on *Austin v. Owens-Brockway Glass*,<sup>64</sup> the magistrate judge provided that he was recommending dismissal because Wright did not follow the required grievance procedures and that his complaint was subject to mandatory arbitration.<sup>65</sup>

*Austin* is a Fourth Circuit case that held that the plaintiff was precluded from bringing a suit for discrimination because his complaint was subject to mandatory arbitration under the CBA in effect at the time.<sup>66</sup> Wright argued to the district court that *Austin* did not apply to his case.<sup>67</sup> He stated correctly that the CBA in *Austin* involved a specific nondiscrimination clause in the collective-bargaining agreement that stated "gender and disability discrimination claims [are] claims . . . that are subject to arbitration."<sup>68</sup> Wright also pointed to a provision in the *Austin* CBA that obligated administration of the contract "in accordance with the applicable provisions of the Americans with Disabilities Act."<sup>69</sup> Because the CBA in his case did not contain such specific provisions, Wright argued, *Austin* should not apply.<sup>70</sup>

The district court rejected Wright's argument that the distinguishing facts of *Austin* rendered it inapplicable, stating that *Austin* was based on

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<sup>59</sup> See *id.* at 394.

<sup>60</sup> See *id.*

<sup>61</sup> See *id.*

<sup>62</sup> See *Wright v. Universal Maritime Serv. Corp.*, No. CIV.A.2:96-0165-18AJ, 1996 WL 942484, at \*1 (D.S.C. Sept. 27, 1996).

<sup>63</sup> See *id.*

<sup>64</sup> 78 F.3d 875 (4th Cir. 1996).

<sup>65</sup> See *Wright*, 1996 WL 942484, at \*1.

<sup>66</sup> See *Austin*, 78 F.3d at 879.

<sup>67</sup> See *Wright*, 1996 WL 942484, at \*1.

<sup>68</sup> *Id.* at \*2 (quoting petitioner's objection).

<sup>69</sup> *Id.*

<sup>70</sup> See *id.*

*Gilmer*.<sup>71</sup> In the arbitration clause at issue in *Gilmer*, the court noted, no reference was made to the statute pursuant to which the claim was brought.<sup>72</sup> The court also based its decision on the “overriding federal policy favoring arbitration.”<sup>73</sup> Wright appealed this decision to the Court of Appeals for the Fourth Circuit.<sup>74</sup>

On appeal, the court agreed with the district court and rejected Wright’s argument that *Austin* was inapplicable to his case.<sup>75</sup> In arguing to the court of appeals, Wright re-asserted that the arbitration clause in his case did not specify that the ADA was covered and should thus not apply to claims governed by the statute.<sup>76</sup> (Again, the language in the CBA was that it covered “all matters” regarding “terms and conditions of employment.”<sup>77</sup>) In rejecting Wright’s position, the court noted that the language in the arbitration clause in *Gilmer* was at least as vague and general, yet that clause was still enforced.<sup>78</sup>

Wright appealed to the Supreme Court.

#### IV. THE SUPREME COURT’S HOLDING

In determining whether the arbitration clause at issue should be enforced, the Court analyzed the applicability of the presumption of arbitration for labor disputes that it had previously found present in the Labor Management Relations Act<sup>79</sup> (LMRA).<sup>80</sup> The Court noted that such a presumption should “not extend beyond the reach of the principal rationale that justifies it, which is that arbitrators are in a better position than courts

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<sup>71</sup> See *id.*

<sup>72</sup> See *id.*

<sup>73</sup> *Id.* (citing *American Recovery Corp. v. CTI*, 96 F.3d 88 (4th Cir. 1996)).

<sup>74</sup> See *Wright v. Universal Maritime Serv. Corp.*, No. 96-2850, 1997 WL 422869, at \*1 (4th Cir. July 29, 1997).

<sup>75</sup> See *id.*

<sup>76</sup> See *id.* at \*2.

<sup>77</sup> *Id.*

<sup>78</sup> See *id.* (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 23 (1991)).

<sup>79</sup> Pub. L. No. 80-101, 61 Stat. 136 (1947) (codified as amended in scattered sections of 29 U.S.C.).

<sup>80</sup> See *Wright v. Universal Maritime Serv. Corp.*, 119 S. Ct. 391, 395 (1998) (citing the *Steel Workers Trilogy*: *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960)).



to interpret the terms of a CBA.”<sup>81</sup> The Court continued that Wright’s cause of action arose out of the ADA, not out of a contract, and the right he sought to enforce was “distinct from any right conferred by the collective-bargaining agreement.”<sup>82</sup> Thus, the Court concluded, the presumption of arbitrability found under the LMRA did not apply to Wright’s dispute.<sup>83</sup>

Next, the Court held that, if a CBA requirement to arbitrate a statutory claim is enforceable (something it declined to decide), it must be stated in “clear and unmistakable” language.<sup>84</sup> The Court based its holding on its decision in *Metropolitan Edison Co. v. NLRB*,<sup>85</sup> in which it held that a union could waive its officials’ statutory right to be free from antiunion discrimination only if such a waiver is “explicitly stated” in the CBA.<sup>86</sup> The Court thought “the same standard [is] applicable to a union-negotiated waiver of employees’ statutory right to a judicial forum for claims of employment discrimination,”<sup>87</sup> reasoning that *Gardner-Denver* “at least stands for the proposition that the right to a federal judicial forum is of sufficient importance to be protected against [a] less-than-explicit union waiver in a CBA.”<sup>88</sup>

Also significant to the Court’s ruling is its acknowledgement of the difference between an individual waiving her own rights versus a union waiving the rights of those it represents.<sup>89</sup> Specifically, the Court rejected the Fourth Circuit’s reliance on *Gilmer*, stating that “*Gilmer* involved an individual’s waiver of his own rights, rather than a union’s waiver of the rights of represented employees—and hence the ‘clear and unmistakable’ standard was not applicable.”<sup>90</sup>

Finally, the Court noted that the CBA in the case before it did not meet the standard of a clear and unmistakable waiver of the employees’ rights

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<sup>81</sup> *Id.* (citing *AT&T Techs., Inc. v. Communications Workers*, 475 U.S. 643, 650 (1986)).

<sup>82</sup> *Id.* at 396.

<sup>83</sup> *See id.*

<sup>84</sup> *Id.*

<sup>85</sup> 460 U.S. 693 (1983).

<sup>86</sup> *Wright*, 119 S. Ct. at 396 (quoting *Metropolitan Edison Co.*, 460 U.S. at 708).

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *See id.* at 397.

<sup>90</sup> *Id.*

under the ADA.<sup>91</sup> This, the Court stated, is why it did not have to resolve the *Gardner-Denver/Gilmer* controversy: in the case before it, the employee was not required to arbitrate his ADA claim regardless of whether a waiver of such a right was enforceable.<sup>92</sup> The Court expressly stated the limit of its holding: "We take no position . . . on the effect of [*Gilmer*] . . . in cases where a CBA clearly encompasses employment discrimination claims, or in areas outside of collective bargaining."<sup>93</sup>

#### V. ANALYSIS—*GARDNER-DENVER* DOES NOT "AT LEAST" STAND FOR THE "CLEAR AND UNMISTAKABLE" STANDARD

Since *Gilmer*, the courts of appeals have been almost unanimous that what remains of *Gardner-Denver* is, at the very least, the notion that an individual's right to have his statutory claim of discrimination adjudicated cannot be bargained away in a majoritarian process.<sup>94</sup> Indeed, in *Gilmer* itself, the Court distinguished *Gardner-Denver* largely on this basis. Notwithstanding, recall that in *Wright* the Court stated that *Gardner-Denver* "at least stands for the proposition that the right to a federal judicial forum is of sufficient importance to be protected against [a] less-than-explicit union waiver in a CBA."<sup>95</sup>

*Gardner-Denver* does not "at least" stand for a rule requiring a clear and unmistakable waiver. An analysis of *Gardner-Denver* and the cases following *Gilmer* that interpret the surviving meaning of *Gardner-Denver* (discussed above) shows that the Court's ruling does not rest on sound reasoning. Indeed, it is difficult to imagine how a clear and unmistakable waiver of the right to a judicial forum under statutes like Title VII and the ADA alleviate the concerns of union representation of individuals in arbitration or of such individual rights being bargained away in a majoritarian process. To state it differently, such a standard is not related to the concern, to quote the Court in *Wright*, of "the importance of the right to a federal judicial forum."<sup>96</sup>

If indeed the Court's "rule" were to become the law of the land, a reasonably competent employer-counsel would simply advise her client to

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<sup>91</sup> See *id.*

<sup>92</sup> See *id.* at 397 n.2.

<sup>93</sup> *Id.*

<sup>94</sup> See cases cited *supra* note 6.

<sup>95</sup> *Wright*, 119 S. Ct. at 396 (emphasis added).

<sup>96</sup> *Id.*

obtain explicit waivers as part of the collective-bargaining agreement. If the clear and unmistakable rule were to take root across jurisdictions, many more unions would eventually bargain away employees' rights to have their civil rights claims adjudicated. The doctrine would be a mere formality with which an employer would have to comply in order to ensure the use of arbitration and avoid litigation for civil rights claims.

Even if the Court's holding can be characterized as an expression of the trend of the Court to favor agreements to arbitrate, the clear and unmistakable rule remains a curiosity. If or when the Court addresses the *Gardner-Denver/Gilmer* tension, it will have to make a judgment as to whether federal statutes, such as the FAA, LMRA, and the Civil Rights Act of 1991 (Title VII), favor arbitration in the context of collective-bargaining agreements.<sup>97</sup> In addition, it would seem that at the center of the Court's analysis would be a weighing of the policies favoring arbitration and alternative dispute resolution against the policies favoring full access to a judicial forum for individuals with civil rights claims. Whether a waiver should be clear and unmistakable does not have a logical nexus with any of these pressing issues.<sup>98</sup>

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<sup>97</sup> Insofar as the Civil Rights Act of 1991 and the FAA are concerned, the circuit courts are split on whether those Acts, read together, endorse or prohibit employer-employee agreements containing prospective waivers of the right to bring civil rights claims in court. *See, e.g., Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182, 1192-1199 (9th Cir. 1998) (discussing the legislative history of the Civil Rights Act of 1991 and concluding that "Congress intended to preclude compulsory arbitration of Title VII claims"); *Seus v. John Nuveen & Co.*, 146 F.3d 175, 182-183 (3d Cir. 1998) (discussing the language and legislative history of the Civil Rights Act of 1991, expressly disagreeing with *Duffield*, and concluding that Title VII (and the Civil Rights Act of 1991) is "entirely compatible with applying the FAA to agreements to arbitrate Title VII claims"); *Mouton v. Metropolitan Life Ins. Co.*, 147 F.3d 453, 457 (5th Cir. 1998) (holding that an employee was required to submit his Title VII claim to arbitration).

<sup>98</sup> One might argue that, with the application of the Court's standard for waivers, individuals would be better protected than without such waivers. This is because it is likely that not all of an individual's civil rights claims would be subject exclusively to arbitration. Indeed, it is possible that a union would "only" explicitly bargain away the right to a judicial forum for a couple of rights; for example, it is possible that only the disabled (ADA) and older workers (ADEA) would be forced to forgo adjudication because those were the only statutes or rights explicitly mentioned in the CBA (in other words, those were the rights the union was willing to bargain away).

Such an argument only serves to illustrate the absurdity of applying the clear and unmistakable standard to address concerns of individual rights being bargained away in a majoritarian process. It is not possible for the Court to logically approve of a waiver

VI. CONCLUSION—THE PRACTICAL MEANING OF *WRIGHT*

The immediate, practical effect of the Court's holding is probably of little consequence outside of the Fourth Circuit.<sup>99</sup> Notwithstanding, it is possible, though not likely, that the Court's application of the *Metropolitan Edison* rule might encourage a circuit or district court that previously followed *Gardner-Denver* to instead apply the rule in *Wright*—even though the Court specifically stated it was not deciding whether waivers in compliance with *Wright* are enforceable. Indeed, as one somewhat wishful-thinking analyst from the employers'-bar perspective opined, "the Court [in *Wright*] seemed to indicate that there is no absolute prohibition against union waivers of employees' federal forum rights for employment discrimination claims."<sup>100</sup>

The truly realistic view of the *Wright* decision is that the Court ducked a divisive and controversial issue, leaving lower courts with virtually no instruction on how to resolve the tension between *Gardner-Denver* and *Gilmer*.<sup>101</sup>

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of a right to a judicial forum for race discrimination claims and to disapprove of a waiver for ADEA claims based merely on the language used in the CBA. That fewer rights to adjudication, or only some rights to adjudication, would be bargained away begs the question as to whether it should be permissible for such rights to be bargained away in the first place.

<sup>99</sup> Recall that, in the context of CBAs, nearly all of the circuits have weighed in on the *Gardner-Denver/Gilmer* tension in favor of *Gardner-Denver*. See *supra* note 6 and accompanying text.

<sup>100</sup> Vercruysse, Metz & Murray, *ADA Claim Is Not Subject to Presumption of Arbitrability*, MICH. EMP. L. LETTER, Dec. 1998, at 3, 3.

<sup>101</sup> The failure of the Court to logically address the *Gardner-Denver/Gilmer* tension raises the question as to why the Court granted certiorari to begin with. Certainly, the most pressing legal issues related to the case before it revolved around that tension. See David E. Feller, *Compulsory Arbitration of Statutory Claims Under a Collective Bargaining Agreement: The Odd Case of Caesar Wright*, 16 HOFSTRA LAB. & EMP. L.J. 53, 66-67 (1998). Feller noted that the Fourth Circuit's opinion contained no law and was unpublished. Interestingly, he argued (before *Wright* was decided by the Supreme Court) that the Court should avoid the *Gardner-Denver/Gilmer* tension and reverse the case on the narrow ground that the arbitration clause before it did not cover ADA claims. See *id.* at 69-70.